

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of A.R. and the)
County School Corporation of) **Article 7 Hearing No. 1058-98**
Brown County)

The appeal is whether the Independent Hearing Officer's (IHO's) order under the facts of this case should be upheld:

1. The language and provisions of the 1997-98 Individualized Education Program (IEP) for the student are to be considered in force for the 1998-99 school year with the following **exception:**

the term "*irrespective of grade eligibility standards*" is to be deleted from the goal/objective statement currently reading "will participate in a group/team sport for the purpose of learning how to cooperate in the attainment of group/team goals, irrespective of grade eligibility standards."

1. The statement referring to the student's potential eligibility for Indiana High School Athletic Association interscholastic activities is to be deleted in its entirety.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

It should be noted from the outset that any references to the "Student" or the "Student's representative" include the parent or parents of the student.

August 12, 1998 Student, through his attorney, Janice E. Smith, Esq., filed a request for a due process hearing with the Indiana Department of Education (IDOE).

The issues were whether the 1997-98 IEP for the Student which provided for additional time for the completion of assignments and tests and waived the grade eligibility standards for participation in the Indiana High School

Athletic Association (IHSAA) programs should be considered in force for the 1998-99 school year.

August 13, 1998 Curtis L. Leggert, Ph.D., was appointed Independent Hearing Officer under 511 IAC 7-15-5.

August 21, 1998 A prehearing conference was conducted by telephone. The following was agreed:

1. The school corporation agreed to the inclusion of the same language found in the 1997-98 IEP concerning time limit accommodations for educational task completion by the student into the 1998-99 IEP.
2. Both parties would file a Joint Motion For Summary Judgment on the remaining unresolved issue regarding the waiving of grade eligibility standards for participation in the IHSAA programs for the 1998-99 school year. Both parties were given the opportunity to submit written arguments as part of the Independent Hearing Officer's deliberation on the motion.

The Student's Motion For Summary Judgment and the School's Submission For Summary Judgment Ruling were timely filed with the IHO.

No due process hearing was conducted.

September 11, 1998 The IHO issued his written decision in the form of a Response to Joint Motion for Summary Judgment.

The IHO noted the student was currently enrolled as a ninth grade student in the local high school. The student was diagnosed as having a primary disability in the area of Emotional Handicap with a secondary disability in the area of Learning Disabilities. No information was currently available that showed a significant change in the student's diagnosed disabilities. The student's IEP for the 1997-98 school year, when he was in the eighth grade, was not formalized until late in that academic year.

The 1997-98 IEP included the following goals or objectives: to be able to participate in school

events, including but not limited to sports programs, in order to develop a positive self-image and a sense of cooperation in meeting common goals; to gain skills which permit him to develop appropriate social/emotional skills; to cooperate with others to attain group goals and objectives; and to participate in a group/team sports for the purpose of learning how to cooperate in the attainment of group/team goals irrespective of grade eligibility standards.

The student completed the 1997-98 school year with successful educational outcomes as noted by his assigned grades. The student has demonstrated continued educational success during the 1998-99 school year as reflected in his grades. The student had not applied for participation in any interscholastic athletic activity during the 1998-99 academic year.

The IHO made the following Conclusions of Law. These read as follows:

Conclusions of Law

1. No information was presented which would negate the student's eligibility for services under 511 IAC 7-11-5 and/or 511 IAC 7-11-7.
2. The cited educational success of the student, both during the period covered by the 1997-1998 Individualized Educational Program and the period of the continuance of that same Individualized Education Program during the 1998-1999 academic school year, provides reasonable demonstration that the provisions of that Individualized Educational Program in terms of placement, support, and/or accommodations and modifications, are sufficient to provide the student with an opportunity to receive educational benefit. [Specifically see 511 IAC 7-12-1(k), 511 IAC 7-12-2(a), and 511 IAC 7-12-2(c)].
3. Title 511 IAC 7-12-2(h) of Indiana Administrative Code contains the following language: "The public school corporation shall take steps to provide non-academic and extra-curricular services and activities in a way that allows the student with disabilities an equal opportunity to participate in those activities and services." In addition, the sub-item 4 in that passage cites the following specific, "athletics, including student manager positions." It is the local school's responsibility to develop such policies, procedures, and/or to enter into agreements that ensure that all students will be viewed equally under their application. 511 IAC 7-12-2(h) reaffirms this requirement as it applies to

disabled students involved in “non-academic and extracurricular services and activities.” The *equal opportunity to participate* portion of 511 IAC 7-12-2(h) is of central issue to the current matter. The inclusion of any language in this or any disabled student’s Individualized Education Program that would specifically limit that student’s “equal opportunity to participate,” and/or any statement that would cite a specific privilege for any student beyond those enjoyed by all students, would be inappropriate.

4. The inclusion in this student’s Individualized Education Program of the proposed statement that, “[the student] will be able to participate in IHSAA sports if he meets IHSAA and school eligibility requirements” is at minimum redundant and more specifically, moot in this current matter. First, it is inherently redundant in that it is clear under 511 IAC 7-12-2(h) that this disabled student may not be “barred” from participation if he meets the “eligibility requirements.” Second, the student has not applied for participation in any current and/or covered activity. Therefore, no action has been taken by the school and/or its representatives to deny the student “an equal opportunity to participate” in any referred to [Indiana High School Athletic Association] activity.

5. Corollary to the above, there is every reason to believe that the desired behavioral outcomes cited in the goals and objectives in the currently operative Individualized Education Program, and cited in the current petition submitted by the parents’ representative, can be achieved through a variety of school-based activities.

The IHO’s Summary Judgment Order reads as follows:

1. The language and provisions of the 1997-98 Individualized Education Program for the student are to be considered in force for the 1998-99 school year with the following **exception:**

the term “*irrespective of grade eligibility standards*” is to be deleted from the goal/objective statement currently reading “will participate in a group/team sport for the purpose of learning how to cooperate in the attainment of group/team goals, irrespective of grade eligibility standards.”

2. The statement referring to the student’s potential eligibility for Indiana High School Athletic Association interscholastic activities is to be deleted in its entirety.

PROCEDURAL HISTORY OF THE APPEAL

The IHO's written decision was issued on September 11, 1998. The Student's Petition for Review was timely received on October 9, 1998. The School's Reply to the Petition for Review was timely filed.

The Indiana Board of Special Education Appeals (BSEA) notified the parties by order dated October 29, 1998, that it would conduct its review on November 6, 1998, beginning at 3:00 p.m., but without oral argument and without the presence of the parties. 511 IAC 7-15-6(k). The BSEA also notified the parties that the review would be tape recorded and a transcript prepared. A copy of the transcript is to be sent to the representatives of the parties when available.

Student's Petition for Review

The Student's Petition for Review was timely filed on October 9, 1998. The Student appealed for the following reasons:

1. The Student concurs with the IHO that the 1997-98 IEP should be in force for the 1998-99 school year. However, the Student differs with the IHO's ruling that deleted the phrase "irrespective of grade eligibility standards" from the IEP. The phrase, the Student argued, should not be deleted from the IEP as there was no basis for any change in the Student's goals, objectives, modifications or accommodations. The Student referenced his written argument submitted prior to the IHO order and incorporated it in its entirety as his argument for this appeal.
2. An IEP should not be modified solely for the benefit of a school corporation to meet requirements of a private agency, namely the IHSAA.
3. The IHO's ruling was contrary to law, in violation of established procedure, and unsupported by substantial evidence.

The Student seeks the following relief:

1. A reversal of the IHO's ruling; and
2. A ruling by the BSEA that the Student's IEP for the 1997-98 school year be adopted in its entirety for the 1998-99 school year.

IHO's Findings of Fact

The Student did not object to any specific Findings of Fact or Conclusion of Law. The thrust of the Petition for Review is concerned with the IHO's orders.

IHO's Order

As noted above, the Student objects to the IHO's ruling in Order #1, which deleted the phrase "irrespective of grade eligibility standards" from the IEP. The Student argues that the phrase should not be deleted from the IEP as there was no basis for any change in the Student's goals, objectives, modifications or accommodations. The Student argues that an IEP should not be modified solely for the benefit of a school corporation to meet the requirements of a private agency, namely the Indiana High School Athletic Association. The Student argues that such a ruling was contrary to law, in violation of established procedure, and unsupported by the evidence.

By inference, the Student also objects to the IHO's ruling in Order #2 that the statement referring to the Student's potential eligibility for the Indiana High School Athletic Association interscholastic activities is to be deleted in its entirety. The Student appeals for a reversal of the IHO's ruling and asks that the BSEA issue a ruling that the Student's IEP for the 1997-98 school year be adopted in its entirety for the 1998-99 school year.

School's Response to the Petition for Review

The School timely filed its Response to the Petition for Review. In summary, the School argues:

1. That the IHO's ruling is accurate, supported by the facts and the law, and allows the Student and the School to accomplish the educational goals and objectives of the IEP.

The School cites several federal and state cases supporting the IHO's order; and

3. The 1997-98 IEP for the Student in the 8th grade allowed team sport activities "irrespective of grade eligibility standards." The 1998-99 IEP for the Student in the 9th grade omitted this "eligibility standard" because the IHSAA rules and regulations apply to the 9-12 grade levels, and the Respondent is a member of the IHSAA. Academic requirements are imposed upon all athletic participants in the high schools belonging to the IHSAA. The academic requirement of the IHSAA

(passing five (5) classes) is reasonable and essential.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The BSEA convened on Friday, November 6, 1998, to review the Petition for Review and the Response thereto in consideration of the record as a whole.¹ The review was tape recorded. A transcript will be made from the tape and provided to the parties by the IDOE.

In consideration of the record, the Petition for Review, and the Response thereto, the BSEA now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
4. This case is moot because the Student is presently eligible to participate in high school sports and therefore there is no actual case or controversy. 511 IAC 7-15-5(b). This rule

¹ BSEA member Richard Therrien did not participate in this review. Mr. Therrien recused himself due to the past provision of unrelated professional services to the public school corporation involved in this dispute.

provides, in part, “. . . Due process hearing issues must present a dispute regarding a current case or controversy involving a student.”

5. The IHO’s order and Conclusions of Law are consistent with the provisions of 511 IAC 7-12-2(h) that allows students with disabilities an equal opportunity to participate in athletics.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the BSEA now:

1. Upholds the decision of the IHO in its entirety.
2. Any other matters not specifically addressed by the BSEA in this written decision are hereby deemed denied or dismissed.

Date: November 9, 1998

/s/Cynthia Dewes
Cynthia Dewes, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial review from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).